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SOUTHERN CALIFORNIA ALLIANCE OF  
PUBLICLY OWNED TREATMENT WORKS and  
CENTRAL VALLEY CLEAN WATER  
ASSOCIATION

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

SOUTHERN CALIFORNIA ALLIANCE  
OF PUBLICLY OWNED TREATMENT  
WORKS, and CENTRAL VALLEY  
CLEAN WATER ASSOCIATION,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY; JARED  
BLUMENFELD, REGIONAL  
ADMINISTRATOR, UNITED STATES  
ENVIRONMENTAL PROTECTION  
AGENCY, REGION IX; and DOES 1 to  
10,

Defendants.

Case No. 2:14-00815

COMPLAINT FOR DECLARATORY  
JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs Southern California Alliance of Publicly Owned Treatment Works ("SCAP")  
and Central Valley Clean Water Association ("CVCWA") (collectively referred to as "Plaintiffs")  
bring this action against Defendant United States Environmental Protection Agency; Defendant  
Jared Blumenfeld, Regional Administrator, United States Environmental Protection Agency,  
Region IX; and Doe Defendants 1 to 10 (collectively referred to as either "USEPA" or

“Defendants”), to challenge and invalidate USEPA’s actions that violated the Administrative Procedures Act (“APA”), 5 U.S.C. §553(b), (c) and §701 *et seq.*, and regulations implementing the Federal Water Pollution Control Act (commonly known as the “Clean Water Act” or “CWA”), 33 U.S.C. §1251 *et seq.*, and allege as follows:

# I. INTRODUCTION

1. On March 17, 2014, USEPA approved the State Water Resources Control Board’s (“State Water Board”) request to use a newly formulated methodology for conducting chronic whole effluent toxicity (“WET”) tests, known as the two-concentration Test of Significant Toxicity (“TST”), as an Alternate Test Procedure (“ATP”). A true and correct copy of the State Water Board’s ATP request letter is attached hereto as **Exhibit A** and a true and correct copy of USEPA’s ATP approval letter is attached hereto as **Exhibit B**. USEPA’s March 17, 2014 action effectively promulgated a new ATP or new method modification in contravention of federal law and regulations.

2. Furthermore, USEPA’s March 17, 2014 action impermissibly exceeded USEPA’s authority by mandating the statewide use of the two-concentration TST in all new or revised National Pollutant Discharge Elimination System (“NPDES”) permits issued by the State Water Board and Regional Water Quality Control Boards and in any EPA-issued California permits that include WET provisions, for both inland and ocean dischargers. This mandate overrules promulgated federal and state regulations, including, but not limited to, Water Quality Control Plans, such as the California Ocean Plan and regional Basin Plans. USEPA’s March 17, 2014 letter constituted a final agency action.

3. Neither USEPA nor the State Water Board has the authority to impose or mandate the use of this two-concentration TST until that method has been promulgated by EPA as an approved method under 40 C.F.R. Part 136. Analytical results obtained by using a non-promulgated method cannot be used for NPDES compliance determination purposes until that method has been properly incorporated into 40 C.F.R. Part 136.

4. Plaintiffs are trade associations with member agencies that own and operate wastewater treatment plants and water reclamation plants, often called Publicly Owned Treatment

1 Works ("POTWs"), which are designed to collect and treat municipal and industrial wastewater.  
 2 Many of Plaintiffs' members operate pursuant to NPDES permits issued by the State Water  
 3 Board, Regional Water Quality Control Boards, or USEPA that include chronic toxicity testing  
 4 and compliance provisions.

5 5. Because USEPA failed to comply with the law and exceeded its statutory authority  
 6 in improperly approving the two-concentration TST as an ATP and in mandating the use of the  
 7 two-concentration TST in all NPDES permits, Plaintiffs' members are now imminently subject to  
 8 the unjustifiably onerous impacts of the two-concentration TST, a test procedure that relies upon  
 9 a default statistical inference known as a "null hypothesis." Under USEPA's promulgated Part  
 10 136 toxicity test methods, the null hypothesis presumes all water is *not* toxic unless proven  
 11 otherwise; similar to the legal presumption of innocence. The null hypothesis under the TST turns  
 12 that normal presumption on its head by presuming water *is* toxic unless proven not to be so,  
 13 which is highly problematic when applied in a strict liability context such as under the CWA. (33  
 14 U.S.C. §§1251, *et seq.*)

15 6. USEPA's failure to comply with the law, as set forth herein, subjects that federal  
 16 agency's actions to judicial review under the APA. In this case, Plaintiffs seek a declaration that  
 17 USEPA acted contrary to the mandates of the APA and the regulations implementing the CWA  
 18 and exceeded its statutory authority. As a result, USEPA's actions are unlawful and void. (28  
 19 U.S.C. §2201; Fed. R. Civ. P. 57.) Plaintiffs further seek preliminary and permanent injunctive  
 20 relief to maintain the status quo pending adjudication, and to forestall irreparable injury to  
 21 Plaintiffs' members and others in the meantime. (28 U.S.C. §2202; Fed. R. Civ. P. 65.)

## 22 II. JURISDICTION AND VENUE

23 7. This Court has jurisdiction over the subject matter of this action pursuant to 28  
 24 U.S.C. section 1331 (federal question jurisdiction), section 1346 (United States as a Defendant),  
 25 section 2201 (authorizing declaratory relief), section 2202 (authorizing injunctive relief), and  
 26 pursuant to 5 U.S.C. section 702 (providing for judicial review of agency action under the APA).

27 8. Plaintiff SCAP has standing to bring this suit on behalf of its members because at  
 28 least one of its members would have standing to sue in its own right; the interests SCAP seeks to

1 protect are germane to its purpose; and neither the claim asserted nor the relief requested requires  
 2 an individual member to participate in this suit. (*See Theodore Roosevelt Conservation P'ship v.*  
 3 *Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010).)

4 9. Plaintiff CVCWA has standing to bring this suit on behalf of its members because  
 5 at least one of its members would have standing to sue in its own right; the interests CVCWA  
 6 seeks to protect are germane to its purpose; and neither the claim asserted nor the relief requested  
 7 requires an individual member to participate in this suit. (*See id.*)

8 10. Defendants have waived sovereign immunity pursuant to provisions of the APA,  
 9 5 U.S.C. sections 701-706.

10 11. Venue is proper in this Court under 28 U.S.C. section 1391(e) because this is an  
 11 action against an agency of the United States; CVCWA maintains its principal place of business  
 12 in this judicial district; and a substantial part of the events or omissions giving rise to this action  
 13 occurred in this judicial district.

### 14 III. PARTIES

15 12. SCAP is a non-profit corporation organized to help ensure that regulations  
 16 affecting POTWs and collection systems are reasonable, lawful, and in the public's best interest.  
 17 SCAP provides leadership, technical assistance, and timely information to its members in order to  
 18 promote regulations and regulatory programs that focus on the sustainable protection of the  
 19 environment and public health, and acts to represent and advocate for the interests of its members  
 20 on issues of importance where, as here, federal and state agencies veer from the requirements set  
 21 forth in laws and regulations.

22 13. CVCWA is a non-profit industry trade association representing municipalities and  
 23 other public entities located within the Central Valley region that provide wastewater collection,  
 24 treatment, and water recycling services to millions of Central Valley residents and businesses.  
 25 CVCWA participates in litigation where, as here, topics of import to the CVCWA membership  
 26 are raised.

27 14. Defendant USEPA is the United States agency primarily responsible for the  
 28 implementation of the Clean Water Act and for oversight of its regional offices, including

USEPA Region IX, and the states acting or exercising permitting authority granted under the CWA. Defendant USEPA is also an agency of the United States charged with certain responsibilities under the APA.

15. Defendant Jared Blumenfeld is the Regional Administrator of USEPA Region IX of the USEPA and is generally responsible for administering USEPA Region IX in accordance with the Clean Water Act and other applicable laws. Mr. Blumenfeld is sued in his official capacity.

16. Doe Defendants 1 to 10 are responsible in some manner for the events herein referred to, and caused injuries proximately thereby to Plaintiffs as alleged herein. The names of the individual Doe defendants are at this time unknown. Plaintiffs will insert the true names and capacities of the fictitiously named defendants when ascertained. Plaintiffs are informed and believe that, at all times herein mentioned, each Doe defendant was the agent of Defendant USEPA and, in doing the things hereinafter alleged, was acting in the scope of such agency and with the permission and consent of USEPA.

#### IV. LEGAL BACKGROUND

17. The CWA created a system for permitting wastewater discharges through the NPDES program. Under CWA sections 301 and 402, all facilities which discharge pollutants from any point source into waters of the United States are required to obtain an NPDES permit. Effluent limitations serve as the primary mechanism in NPDES permits for controlling discharges of pollutants from point sources to receiving waters. Water quality standards are used as the basis for deriving the specific effluent limitations in NPDES permits. (40 C.F.R. § 122.44(d).)

18. USEPA is required to review and to approve or disapprove state-adopted water quality standards under the CWA. Under CWA section 303(c), “a water quality standard . . . consist[s] of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. (33 U.S.C. § 1313(c)(2)(A) (emphasis added).) Generally, “uses” are the types of activities for which the water can be used (e.g., recreation, agriculture), and “criteria” are the numeric or narrative water quality levels necessary to support the water’s designated uses. Numeric criteria are expressed as specific concentrations of individual

pollutants (e.g., no more than 5 mg/l pollutant X). Narrative criteria (e.g., no toxics in toxic amounts) are the catch-all of water quality regulation, expressed as narrative statements describing a desired water quality goal.

19. Within the NPDES program, freshwater and marine acute and chronic whole effluent toxicity tests are used in conjunction with other chemical analyses to evaluate and assess the compliance of wastewater discharges and surface waters with water quality standards under the CWA.

20. “Whole effluent toxicity” or “WET” is a term used to describe the aggregate toxic effect of an aqueous sample (e.g., whole effluent wastewater discharge) as measured by a laboratory organism’s response upon exposure to the sample, including lethality or death, impaired growth, or reproduction. WET tests are designed to replicate the total effect and environmental exposure of aquatic life to toxic pollutants in an effluent without initially requiring the identification of the specific pollutants. More in-depth analyses, known as Toxicity Identification Evaluations (“TIEs”) and Toxicity Reduction Evaluations (“TREs”) are done if toxicity is detected in order to determine what pollutant or pollutants are likely causing the toxicity.

21. Section 304(h) of the CWA requires USEPA to “promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 401 of [the CWA] or permit application pursuant to section 402 of [the CWA].” (33 U.S.C. §1314(h).)

22. USEPA regulations at 40 C.F.R. Part 136 prescribe the specific test procedures and methods that must be used for the analysis of pollutants in all applications and reports submitted under the NPDES program under section 402 of the CWA, as well as State certifications pursuant to section 401 of the CWA. (40 C.F.R. §§136.1(a), 136.3; *see also* 40 C.F.R. §122.44(i)(iv) (monitoring to be done according to test procedures approved under 40 C.F.R. Part 136).)

23. Under limited circumstances and subject to specific regulatory requirements, a person may request to use an Alternative Test Procedure not previously approved and formally promulgated by USEPA. (40 C.F.R. §136.3(a).) The ATP process was designed to “encourage

1 organizations external to EPA to develop and submit for approval new analytical methods.” (See  
 2 *Guide to Method Flexibility and Approval of EPA Water Methods*, USEPA Office of Water (Dec.  
 3 1996) at p. 77.) USEPA regulations at sections 136.4 and 136.5 describe the specific procedures  
 4 and requirements for obtaining USEPA review and approval of ATPs. (40 C.F.R. §§136.4,  
 5 136.5.)

6 24. Under 40 C.F.R. section 136.4, a person seeking approval of an ATP for  
 7 nationwide use must submit its application to the National Alternate Test Procedure Program  
 8 Coordinator at USEPA Headquarters in Washington, D.C. for approval. If approved, USEPA  
 9 will propose to amend 40 C.F.R. section 136.3 to include the ATP as an approved analytical  
 10 method through notice and comment rulemaking. The ATP is not approved for nationwide use  
 11 unless and until the ATP is approved by publication in a final rule in the Federal Register. (40  
 12 C.F.R. §136.4(c).)

13 25. Under 40 C.F.R. section 136.5, a person seeking approval of an ATP for limited  
 14 use must submit its application to the Regional Alternate Test Procedure Coordinator or  
 15 permitting authority for approval. (40 C.F.R. §136.5(a).) When the request for the use of an ATP  
 16 concerns use in a State with a delegated NPDES permit program approved pursuant to section  
 17 402 of the CWA, such as California, the following is required: “[T]he requestor shall first submit  
 18 an application for limited use to the Director of the State agency having responsibility for  
 19 issuance of NPDES permits within such State (i.e., permitting authority). The Director will  
 20 forward the application to the Regional ATP Coordinator or permitting authority with a  
 21 recommendation for or against approval.” (40 C.F.R. §136.5(b).) If approved by the Regional  
 22 ATP Coordinator, “the approval may be restricted to use only with respect to a specific discharge  
 23 or facility (and its laboratory) or, at the discretion of the Regional ATP Coordinator or permitting  
 24 authority, to all discharger [sic] or facilities (and their associated laboratories) specified in the  
 25 approval for the Region.” (40 C.F.R. §136.5(d).) In this case, the requestor was the State agency.

26 26. Pursuant to USEPA guidance related to ATPs, the “limited use” ATP approach can  
 27 apply to applications for single discharger, single laboratory facility uses (i.e., Tier 1), or multi-  
 28 discharger, multi-laboratory facility uses (i.e., Tier 2 and Tier 3). All but a single lab, single

1 discharger ATP (i.e., Tier 1) must go through rulemaking. For Tier 2 and 3 new methods (multi-  
 2 lab), "EPA will begin the rulemaking process." (*See Guide to Method Flexibility and Approval of*  
 3 *EPA Water Methods*, USEPA Office of Water (Dec. 1996 Draft) at pp. 80-82.)

4 27. USEPA has issued protocols detailing the information needed to evaluate ATP  
 5 applications for potential approval. However, by its own admission, USEPA does not currently  
 6 have a protocol for approving ATPs for WET testing. (*Id.* at p. 93 ("EPA is developing a  
 7 protocol for approval of new and modified (alternate) WET methods...."; *see also*  
 8 <http://water.epa.gov/scitech/methods/cwa/atp/questions.cfm> (last accessed 6/22/2014) (stating  
 9 "Note: The EPA does not have a protocol for toxicity testing [ATP] under EPA's Whole Effluent  
 10 Toxicity (WET) program.").)

11 28. Under 40 C.F.R. section 136.6, a person may make limited minor modifications to  
 12 an approved testing method included in 40 C.F.R. Part 136.3 without prior USEPA approval,  
 13 including for example, changing purge volumes and automating manual methods. However,  
 14 changes to the determinative step, the quality control, or significant chemistry of the method, are  
 15 outside the scope of modifications authorized by section 136.6. Additionally, the Method  
 16 Modification approach under section 136.6 applies only to CWA chemical methods and cannot be  
 17 used for "Method-Defined Analytes." Specifically, USEPA regulations prohibit modifications of  
 18 WET methods. (40 C.F.R. §136.6(b)(3) ("Restrictions. An analyst may not modify an approved  
 19 Clean Water Act analytical method for a method-defined analyte.") (emphasis added).) Whole  
 20 effluent toxicity methods are *not chemical methods* and USEPA has previously declared that  
 21 WET is a Method-Defined Analyte. (*See* 67 Fed. Reg. 69,965 ("toxicity is inherently defined by  
 22 the measurement system (a 'method-defined analyte') and toxicity cannot be independently  
 23 measured apart from a toxicity test.").)

24 29. In November of 2002, USEPA promulgated through a formal rulemaking process  
 25 short-term chronic WET test methods for use in monitoring compliance with NPDES permit  
 26 limitations in accordance with 40 C.F.R. Part 136. (*See* Guidelines Establishing Test Procedures  
 27 for the Analysis of Pollutants; Whole Effluent Toxicity Test Methods; Final Rule, 67 Fed. Reg.  
 28 69,952 (Nov. 19, 2002) (the "2002 Methods").) These methods specifically include the No-

Observed-Effect-Concentration (“NOEC”) and the 25% Inhibition Concentration (“IC25”). The 2002 Methods are USEPA’s promulgated WET methods that specify a null hypothesis, which presumes an effluent sample is non-toxic and requires testing to determine compliance with an NPDES effluent limitation consisting of a control group and a minimum of five effluent concentrations in order to evaluate the validity of the dose-response relationship. (See 2002 Methods.) The 2002 Methods do not mention the TST or provide that the two-concentration TST may be used as an approved method.

30. In June of 2010, USEPA issued a guidance document regarding a potential new statistical method for use in whole effluent toxicity testing called the TST. (See National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document, EPA 833-R-10-003 (June 2010).) The TST procedure is designed for the toxicity test to be performed on test organisms using two test concentrations: a control group and an effluent-exposed group. The TST statistical method was merely a guidance document, which was not promulgated through notice and comment rulemaking and which includes an explicit disclaimer in that guidance document specifically confirming that the document is not “a permit or a regulation itself.” In fact, that guidance document stated:

“The document does not and cannot impose any legally binding requirements on EPA, states, NPDES permittees, or laboratories conducting or using WET testing for permittees (or for states in evaluating ambient water quality). EPA could revise this document without public notice to reflect changes in EPA policy and guidance.”

31. In 2012, USEPA amended the whole effluent toxicity test methods in its modifications to the Promulgated Guidelines Establishing Test Procedures for the Analysis of Pollutants under the Clean Water Act: Analysis and Sampling Procedures. (Final Rule, 77 Fed. Reg. 29758 (May 18, 2012).) These amendments did *not* incorporate the TST, even though it had been available as guidance for nearly two years.

## V. FACTUAL BACKGROUND

32. On February 12, 2014, the State Water Board asked for USEPA Region IX approval of “a two-concentration test design when using the Test of Significant Toxicity (TST)

hypothesis testing approach” “[p]ursuant to Code of Federal Regulations, title 40, section 136.4.” (See Exhibit A, SWRCB ATP Request Letter from Renee Spear to Eugenia McNaughton, EPA Region IX (Feb. 12, 2014) at p. 1.)

33. On March 17, 2014, USEPA Region IX, in turn and in record time, approved a statewide, limited use ATP under 40 C.F.R. Part 136.5. (See Exhibit B, EPA ATP Approval Letter from Eugenia McNaughton, Ph.D. to Renee Spear, SWRCB (March 17, 2014).)

34. USEPA Region IX went beyond approving the limited use ATP request to apparently *mandating* the use of the two-concentration TST, stating that “it will apply to all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued California permits that include whole effluent toxicity provisions.” Further, USEPA applied this ATP to non-ocean and ocean waters, even though application to ocean waters was not requested by the State Water Board in its ATP request.

## VI. PLAINTIFFS’ CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

(Declaratory Relief Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 – Wrongful Approval of ATP in Violation of the Administrative Procedures Act)

35. Plaintiffs refer to and incorporate by this reference all allegations set forth in paragraphs 1 through 34 above.

36. The APA authorizes the Court to hold unlawful and set aside final USEPA actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” (5 U.S.C. §706(2)(A).)

37. USEPA’s action approving an ATP for whole effluent toxicity is contrary to federal regulations, specifically 40 C.F.R. sections 136.4, 136.5, and 136.6.

38. USEPA violated federal regulations by approving a statewide “limited use” ATP under Section 136.5 despite the fact that the State Water Board specifically requested approval of an ATP “[p]ursuant to Code of Federal Regulations, title 40, section 136.4” for nationwide use. (Emphasis added.) Assuming that the State is an appropriate party to request an ATP, the appropriate response by USEPA Region IX would have been to transfer the ATP request made

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under section 136.4 to USEPA Headquarters for review.

39. USEPA violated federal regulations by approving a limited use ATP to be applied statewide in contravention of 40 C.F.R. section 136.5 as interpreted through USEPA guidance, which indicates that all ATPs applicable to multiple dischargers or laboratory facilities (Tier 2 or Tier 3) must be promulgated through a formal rulemaking process.

40. USEPA violated federal regulations by approving the two-concentration TST as an ATP or method modification in contravention of 40 C.F.R. Part 136 and USEPA guidance, including but not limited to Part 136.6 that restricts method modifications to chemical methods and prohibits modification of method-defined analytes, such as whole effluent toxicity.

41. USEPA arbitrarily and capriciously approved a statewide, limited use ATP despite the fact that USEPA currently has no approved protocols for reviewing or approving whole effluent toxicity ATPs under 40 C.F.R. sections 136.4 or 136.5.

42. USEPA's interpretation of the requirements of 40 C.F.R. Part 136, as set forth herein, was arbitrary and capricious.

43. USEPA approved the use of the TST as an ATP without conformity to requirements for promulgation of test methods under CWA Section 304(h) and 40 C.F.R. Part 136.

44. USEPA's action was arbitrary and capricious, violated federal regulations, and works great prejudice to the regulated community, including Plaintiffs' members. USEPA violated regulations implementing CWA section 304(h), and thus acted in an arbitrary and capricious manner, abused its discretion, and acted in a manner not in accordance with law, as set forth herein.

45. The APA authorizes the Court to hold unlawful and set aside final USEPA actions that are without observance of procedure required by law. (5 U.S.C. §706(2)(D).)

46. An actual and substantial controversy has arisen and presently exists between Plaintiffs and USEPA regarding the validity of USEPA's March 17, 2014 letter approving the TST as an ATP in violation of federal regulations. USEPA's actions as described herein are unlawful and therefore invalid. Plaintiffs are informed and believe that USEPA disputes these

contentions.

47. Because Plaintiffs have no adequate remedy at law for USEPA's actions, and Plaintiffs' members will imminently incur substantial harm as the result of USEPA's wrongdoing, a declaration is necessary to clarify the parties' obligations and to inform the public.

48. Plaintiffs seek an order pursuant to 28 U.S.C. section 2201 and Federal Rule of Civil Procedure 57, declaring the USEPA action of March 17, 2014, approving of the two-concentration TST as an ATP, void.

## SECOND CLAIM FOR RELIEF

### **(Declaratory Relief Pursuant to 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57 – Improper Mandate in Violation of Administrative Procedures Act)**

49. Plaintiffs refer to and incorporate by this reference all allegations set forth in paragraphs 1 through 48 above.

50. The APA authorizes the Court to hold unlawful and set aside final USEPA actions that are "in excess of statutory . . . authority." (5 U.S.C. §706(2)(C).)

51. Nothing in the CWA or its implementing regulations grants USEPA the authority to mandate the use of an ATP over other officially promulgated methods.

52. By mandating the use of the two-concentration TST for all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued NPDES permits in California that include WET provisions, USEPA has exceeded its statutory authority under CWA section 304(h) and 40 C.F.R. Part 136 in violation of the APA.

53. The APA requires that when an agency promulgates a rule, it shall publish "general notice of the proposed rule making in the Federal Register" and "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." (5 U.S.C. §553(b), (c).)

54. In its March 17, 2014 letter, USEPA imposed mandatory requirements for future actions. These requirements set forth new, prospective, and apparently binding requirements of general applicability. Therefore, these recommendations are "rules" within the meaning of the APA. USEPA mandates the use of a particular test methodology without conformity to requirements of the APA for the promulgation of rules.

55. USEPA's action unlawfully mandates the use of a particular test method in violation of federal law, as set forth herein, including, but not limited to 40 C.F.R. section 136.3(a), which allows compliance to be determined by either the standard analytical test procedures or by any ATP. (40 C.F.R. §136.3(a).) Failure to comply with federal law works great prejudice to the regulated community, including Plaintiffs' members. USEPA's action is a final agency action and has direct legal consequences in imposing obligations on the State Water Board and Regional Water Quality Control Boards in California as the "permitting authority" and on regulated entities including Plaintiffs' members that must obtain permits with WET testing provisions and effluent limitations based on the two-concentration TST.

56. An actual and substantial controversy has arisen and presently exists between Plaintiffs and USEPA regarding the validity of USEPA's imposition of new rules by mandating the use of the two-concentration TST as an ATP on Plaintiffs through new CWA requirements (e.g. NPDES permits, Basin Plan Amendments, etc.) without engaging in the rulemaking process required by the CWA regulations and the APA. USEPA's actions as described herein are unlawful and therefore invalid. Plaintiffs are informed and believe that USEPA disputes these contentions.

57. Because Plaintiffs have no adequate remedy at law for USEPA's actions, and because Plaintiffs' members will imminently incur substantial harm as the result of USEPA's wrongdoing, a declaration is necessary to clarify the parties' obligations and to inform the public.

58. Plaintiffs seek an order pursuant to 28 U.S.C. section 2201 and Federal Rule of Civil Procedure 57, declaring the USEPA action of March 17, 2014, purporting to mandate use of a particular toxicity testing methodology, and to impose rules on Plaintiffs through the "permitting authority" of the State Water Board and Regional Water Quality Control Boards without following the rulemaking process required by the CWA regulations and the APA, void.

### THIRD CLAIM FOR RELIEF

(Injunctive Relief Pursuant to 28 U.S.C. § 2202 and Federal Rule of Civil Procedure 65 – Preliminary and Permanent Injunctive Relief)

59. Plaintiffs refer to and incorporate by this reference all allegations set forth in paragraphs 1 through 58 above.

1           60.     Plaintiffs seek an order pursuant to 28 U.S.C. section 2202 and Federal Rule of  
2 Civil Procedure 65 to temporarily restrain and preliminarily and permanently enjoin the USEPA  
3 from enforcing the portions of its March 17, 2014 letter that purport to authorize and mandate the  
4 use of the two-concentration TST for water quality regulation, permitting, and compliance  
5 determination purposes.

6           61.     There is a substantial likelihood that Plaintiffs will succeed on the merits of the  
7 claims for the relief pled herein.

8           62.     Plaintiffs' members are likely to suffer or have already suffered irreparable injury  
9 in the absence of preliminary injunctive relief. Many of Plaintiffs' members operate POTWs  
10 pursuant to NPDES permits issued by the State Water Board, Regional Water Quality Control  
11 Boards, or USEPA that include chronic toxicity testing and compliance provisions. If not  
12 enjoined from enforcing the portions of its March 17, 2014 letter, which apparently mandates the  
13 use of the two-concentration TST for testing and compliance purposes in all NPDES permits,  
14 many, if not all, of Plaintiffs' members as well as all dischargers in the state will be required to  
15 begin using and reporting results from an alternative WET testing method that adversely affects  
16 their compliance status.

17           63.     Imposition of the two-concentration TST as the mandatory WET testing method  
18 will result in an increased cost to Plaintiffs' members in order to undertake the additional  
19 replicate samples necessary to reduce the likelihood of being found in violation; an increased  
20 frequency of false failures in toxicity testing; and, as a result, a higher alleged incidence of  
21 noncompliance with NPDES permits, potentially resulting in civil and even criminal liability.  
22 Immediate injunctive relief is necessary given the fact that many of Plaintiffs' members have  
23 recently obtained or are in the process of obtaining new or revised NPDES permits from the State  
24 Water Board, Regional Water Quality Control Boards, or USEPA that include chronic toxicity  
25 testing and compliance provisions. These permits are or soon will be subject to USEPA's  
26 unlawful mandate if USEPA is not immediately enjoined from enforcing its March 17, 2014  
27 letter.

28     ///

64. The threatened injury outweighs any damage that an injunction may cause the Defendant since an injunction would merely maintain the status quo that existed prior to the issuance of the USEPA's March 17, 2014 letter.

65. An order enjoining USEPA from enforcing an unlawful mandate is consistent with and serves the public interest.

66. Because Plaintiffs have no adequate remedy at law for USEPA's actions, and because Plaintiffs' members have or will imminently incur substantial harm as the result of USEPA's wrongdoing, preliminary and permanent injunctive relief is appropriate. Preliminary injunctive relief that maintains the status quo pending adjudication of this matter is necessary in order to forestall irreparable injury to Plaintiffs and their members as demonstrated above.

### PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

- A. Declare that USEPA's issuance of the March 17, 2014 letter approving an ATP and mandating the use of the two-concentration TST was:
  - a. Made without observance of procedure required by law within the meaning of APA section 706(2)(D); or
  - b. Not in accordance with law within the meaning of APA section 706(2)(A); and
  - c. Beyond USEPA's statutory jurisdiction, authority or limitations, within the meaning of APA section 706(2)(C).
- B. Declare that USEPA's March 17, 2014 approval and mandate of the use of the two-concentration TST is void.
- C. Order that USEPA and its officers, employees, and agents, are temporarily and permanently enjoined from imposing, implementing, or enforcing any provision of the March 17, 2014 letter approving the two-concentration TST as an Alternate Test Procedure until the USEPA complies with all of its obligations as required by law and adopts said requirements through notice and comment rulemaking procedures as required by the APA.

///

1 D. Order that USEPA and its officers, employees, and agents, are temporarily and  
2 permanently enjoined from mandating the use of the two-concentration TST or the use of  
3 analytical results obtained by using this non-promulgated method for NPDES compliance  
4 determination or other Clean Water Act purposes.

5 E. Award Plaintiffs reasonable attorneys' fees and costs incurred in the prosecution of this  
6 action.

7 F. Grant such other and further relief as this Court deems just and proper.

8  
9 DATED: June 25, 2014

DOWNEY BRAND LLP

10  
11 By: 

MELISSA A. THORME

Attorney for Plaintiffs

12 SOUTHERN CALIFORNIA ALLIANCE OF  
13 PUBLICLY OWNED TREATMENT WORKS  
14 and CENTRAL VALLEY CLEAN WATER  
15 ASSOCIATION  
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# EXHIBIT A



## State Water Resources Control Board

February 12, 2014

Eugenia McNaughton, Ph.D., Chief  
Quality Assurance Office  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Dear Dr. McNaughton:

Pursuant to Code of Federal Regulations, title 40, section 136.4, the State Water Resources Control Board (State Water Board) is submitting this application for US EPA Region 9 review and approval of the statewide Alternate Test Procedure use of a two-concentration test design when using the Test of Significant Toxicity (TST) hypothesis testing approach.

State Water Board staff is developing an amendment to the Water Quality Control Plan for Enclosed Bays and Estuaries of California that will standardize the regulation of aquatic toxicity for all non-oceanic surface waters. The United States Environmental Protection Agency's (US EPA) TST hypothesis testing approach (US EPA 2010) is an essential component of this proposed toxicity amendment as it forms the basis for the numeric water quality objectives and acts as the primary means of determining compliance with the effluent limitations.

Toxicity tests are vital tools used to measure the aggregate effects of pollutants, detect unknown toxicants, and assess their bioavailability in a more effective manner than that of pollutant-specific tests and bioassessments. Test methods, developed for both freshwater and marine organisms, are divided between acute and chronic endpoints. Acute toxicity tests measure lethality, while chronic toxicity tests focus on sub-lethal effects, such as reductions in growth and reproduction. Currently, toxicity tests are used to determine compliance with the narrative objectives for toxicity established in the Regional Water Quality Control Plans (Basin Plans). Section 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (State Implementation Policy or SIP) establishes minimum chronic toxicity requirements for implementing these narrative water quality objectives for toxicity. However, discrepancies persist among the toxicity requirements included in National Pollutant Discharge Elimination System (NPDES) permits and Waste Discharge Requirements (WDR). The draft toxicity amendment seeks to create a uniform regulatory framework to address these inconsistencies through the required use of the TST for all NPDES wastewater and point source WDR dischargers in California.

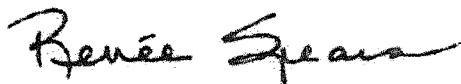
Use of the TST does not alter the test procedures used to produce the biological endpoints of US EPA's toxicity test methods (e.g. organism age, food, temperature, exposure length); it merely alters the minimum number of test concentrations required for toxicity testing.

The benefits of the TST approach have been lauded by numerous academicians. The five peer reviewers selected in a blind fashion for US EPA's peer review process agreed that the TST's bioequivalence approach is sound and that the results of TST analyses are reasonable and defensible. The State Water Board also initiated a peer review focusing on the use of the TST approach in the draft Policy for Toxicity Assessment and Control (the previous iteration of the toxicity amendment). The two researchers, Dr. Gerald A. Le Blanc and Dr. Michael C. Newman, concluded that the TST is a "...major advance from the currently compromised No Observed Effects Concentration (NOEC) approach," and "...is statistically sound, reduces burden associated with the assays, and, by structuring the assay around a hypothesis of significant toxicity, provides incentive for precision in assay performance." In addition, four individual articles examining the TST approach have been published in two respected, peer-reviewed toxicological journals (Denton et al. 2011, Diamond et al. 2011, Zheng et al. 2012, Diamond et al. 2013), while the State Water Board published a report (State Water Board 2011-please see attachment) comparatively analyzing the results of over 3,000 toxicity tests using both the TST and traditional hypothesis approaches. Although this "test drive" analysis showed that the results of the NOEC and TST are generally the same, it is important to note that the TST correctly identified truly non-toxic samples more often than the NOEC did. Moreover, the NOEC failed to identify more truly toxic samples than the TST approach.

The TST approach is currently being used to implement Tribal and Territory NPDES permits issued by US EPA Region 9, as well as the US EPA Region 9 offshore oil and gas general permit (No. CAG280000). The State Water Board has included provisions requiring the use of the TST approach in the Caltrans general permit for storm water discharges (Order No. 2012-0011-DWQ), the NPDES permit issued to the US Department of the Navy's San Diego Naval base (Order No. R9-2013-0064), the San Diego Regional Water Quality Control Board's general permit for discharges from boatyards and boat maintenance and repair facilities (Order No. R9-2013-0026), and the NPDES permit issued to the US Department of the Navy's San Diego Naval base (Order No. R9-2013-0064). The TST approach has also been incorporated into several NPDES permits in Hawaii.

The State Water Board is confident that the use of the TST will strengthen toxicity regulation throughout California. Apart from improving the statistical power of toxicity test methods, the TST is simpler to use than either traditional hypothesis test methods or point estimates. In addition, the two-concentration test design will reduce the cost of toxicity monitoring for most wastewater dischargers in California. For these, and the other reasons discussed previously in this letter, the State Water Board requests that US EPA Region 9 review and approve the use of a two-concentration test design for TST-based analyses of the whole effluent toxicity testing methods promulgated in Code of Federal Regulations, title 40, section 136.3.

Sincerely,



Renee Spears  
Quality Assurance Officer

FELICIA MARCUS, CHAIR | THOMAS HOWARD, EXECUTIVE DIRECTOR

cc: (via e-mail)

Jonathan Bishop, Chief Deputy Director  
State Water Resources Control Board

Victoria Whitney, Deputy Director  
Division of Water Quality  
State Water Resources Control Board

Phillip Crader, Assistant Deputy Director  
Division of Water Quality  
State Water Resources Control Board

Rich Breuer, Assistant Deputy Director  
Office of Information Management  
State Water Resources Control Board

Rik Rasmussen, Section Chief  
TMDL Section  
State Water Resources Control Board

Brian Ogg, Environmental Scientist  
Inland Planning Standards and  
Implementation Unit  
State Water Resources Control Board

**References:**

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State Water Resources Control Board peer review:

*Gerald A. LeBlanc, PhD*

[http://www.waterboards.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/docs/gerald\\_leblanc\\_review.pdf](http://www.waterboards.ca.gov/water_issues/programs/state_implementation_policy/docs/gerald_leblanc_review.pdf)

*Michael C. Newman, PhD*

[http://www.waterboards.ca.gov/water\\_issues/programs/state\\_implementation\\_policy/docs/michael\\_newman\\_review.pdf](http://www.waterboards.ca.gov/water_issues/programs/state_implementation_policy/docs/michael_newman_review.pdf)

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# EXHIBIT B



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION IX  
75 Hawthorne Street  
San Francisco, CA 94105

March 17, 2014

Renee Spears  
Quality Assurance Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento CA 95814

Dear Ms. Spears:

This letter address the State Water Resources Control Board (State Water Board) request of February 12, 2014 to use the two –concentration test design to evaluate toxicity tests using the Test of Significant Toxicity (TST) hypothesis to comply with the Code of Federal Regulations, title 40, section 136.3 and 136.5. The EPA Region 9 Quality Assurance Office (QAO) has reviewed your request, justification and supporting documentation.

I am pleased to inform you that we have determined that the State Water Board's proposed use of the two-concentration toxicity test evaluated using the Test of Significant Toxicity (TST) is an acceptable equivalent under the ATP process to the five-concentration test evaluated using NOEC-LOEC hypothesis testing recommended in 40 CFR Part 136.5. While the results of the TST should generally be similar to those of the NOEC-LOEC test, it improves understanding of discharge condition by correctly identifying toxic and non-toxic samples more often than when using the latter. In summary, we agree that when using the TST statistical approach, the use of the two-concentration is an appropriate test design.

Please note that approval is in this case state-wide, that is, it will apply to all new or revised NPDES permits issued by the State Water Board and Regional Water Quality Control Boards and any EPA-issued California permits that include whole effluent toxicity testing provisions.

Please contact me (415-972-3411) if you have further questions.

Sincerely,

A handwritten signature in cursive script, reading "Eugenia McNaughton", is written above the typed name.

Eugenia McNaughton, Ph.D.  
Manager, Quality Assurance Office